

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL L. BEATTIE,

No. C 11-1187 CW (PR)

Plaintiff,

ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT;
DENYING PLAINTIFF'S CROSS-
MOTION FOR SUMMARY JUDGMENT;
DENYING AS MOOT PLAINTIFF'S
REQUEST FOR COURT DOCUMENTS

v.

SUE RISENHOOVER, et al.,

Defendants.

(Docket nos. 16, 19, 23)

_____/

INTRODUCTION

Plaintiff, a state prisoner currently incarcerated at R.J. Donovan State Prison in San Diego, filed this pro se civil rights action pursuant to 42 U.S.C. § 1983, alleging deliberate indifference to his serious medical needs by medical practitioners at Pelican Bay State Prison (PBSP).

Defendants Dr. Nancy Adam, Family Nurse Practitioner (FNP) Sue Risenhoover and Chief Medical Officer Dr. Michael Sayre, who are represented by the law firm of Andrada & Associates, have filed a motion for summary judgment, as has Defendant Dr. Martinelli, who is represented by the law firm of Janssen Malloy, LLP. Plaintiff has filed a joint opposition to both motions and a cross-motion for summary judgment. Defendants have replied to Plaintiff's opposition and Dr. Martinelli has opposed Plaintiff's motion for summary judgment.

For the reasons discussed below, the Court GRANTS Defendants' motions for summary judgment and DENIES Plaintiff's motion for summary judgment.

BACKGROUND

The following facts are taken from the parties' verified pleadings and declarations. They are undisputed unless otherwise noted.

Plaintiff suffers from ulcerative colitis, an inflammatory bowel disease that causes inflammation and sores in the large intestine. Ulcerative colitis also may be called colitis or proctitis. Decl. Michael Sayre Supp. Summ. J. (Sayre Decl.) ¶ 3. The events at issue occurred when Plaintiff was housed in the Transitional Housing Unit (THU) at PBSP in 2009 and 2010. At that time, Dr. Sayre was the Chief Medical Officer at PBSP, FNP Risenhoover was Plaintiff's primary care provider (PCP) at PBSP, Dr. Adam was a physician and surgeon at PBSP, and Dr. Martinelli was a contracting physician providing primary and specialty colonoscopy care and treatment to inmates at PBSP.

Plaintiff's medical records reflect that in October 1998, while he was incarcerated at PBSP, a rectal biopsy showed he was suffering from moderate chronic proctitis with a possibility of chronic inflammatory bowel disease. In June 2003, he underwent a five-year checkup; colon biopsies showed a benign colon mucosa and a benign lymphoid polyp. Compl. ¶ 5; Sayre Decl. ¶ 5 & Ex. A.

Plaintiff remained symptom-free until early May 2009, when he began experiencing painful cramping, mucus discharge and blood in his stool, and more frequent bowel movements. Compl. ¶ 5. On May 3, he submitted a medical health care request to see a doctor;¹ on

¹ All events described hereinafter occurred in 2009, unless otherwise noted.

1 May 4, he was seen by a nurse who scheduled him for an evaluation
2 with his PCP. Sayre Decl. ¶ 6. On May 7, Plaintiff submitted
3 another medical request form stating his symptoms were worsening.
4 Compl. ¶ 7 & Ex. A-2.² On May 11, he was seen by a nurse who
5 prescribed a Colocort enema³ for two days and advised Plaintiff to
6 stop eating dairy products. Sayre Decl. ¶ 7 & Ex. C.

7 Between May 19 and 21, Plaintiff submitted three medical
8 requests to see a doctor due to severe abdominal cramps and bloody
9 stools. Compl. & Ex. B. On May 21, Dr. Adam spoke with one of
10 the nurses who had seen Plaintiff about his condition. Dr. Adam
11 noted a "flare of colitis" in the chart. She prescribed Asacol,
12 Prednisone and Colocort.⁴ She also ordered lab tests. Sayre
13 Decl. ¶ 8 & Ex.

14 On May 25, Plaintiff filed an administrative appeal
15 complaining he was not being provided with adequate care for his
16 symptoms. He requested that he be provided a colonoscopy, a
17 protein supplement, and medication that he had been prescribed in
18 the past for his colitis. He was interviewed by a nurse on May
19 29; she granted his request to be referred for a colonoscopy,
20

21 ² The exhibits to which Plaintiff refers in his complaint are
22 submitted in support of his opposition to Defendants' motions for
summary judgment.

23 ³ A Colocort enema is used together with other medications to
24 treat ulcerative colitis, proctitis, and other inflammatory
conditions of the lower intestines and rectal area.

25 ⁴ Asacol is an anti-inflammatory medication used to treat
26 ulcerative colitis. Prednisone is a corticosteroid that is used
27 as an immune system suppressant in the treatment of ulcerative
28 colitis.

1 denied his request for a protein supplement because it was not
2 medically indicated, informed him that his current medication
3 (Asacol) was the same as what he had requested, and noted that his
4 lab results were normal. Sayre Decl. ¶ 9 & Ex. E.

5 On June 7, Plaintiff submitted another medical request
6 complaining that the treatment he was receiving was not adequate
7 because he continued to suffer from abdominal cramps and frequent
8 bloody stools. On June 10, he was seen by a nurse who scheduled
9 him to see Dr. Martinelli at the specialty clinic "next
10 Wednesday," and noted that he had a pending follow-up appointment
11 with his PCP. Sayre Decl. ¶ 10 & Ex. F.

12 On June 17, Plaintiff saw Dr. Martinelli for the first time,
13 for a colonoscopy consultation; Dr. Martinelli took Plaintiff's
14 history, performed a physical examination, and recommended that he
15 be scheduled for a colonoscopy. Decl. Thomas Martinelli Supp.
16 Mot. Summ. J. (Martinelli Decl.) ¶ 8. On June 24, Dr. Sayre
17 approved Plaintiff's request for a colonoscopy. Sayre Decl. ¶ 11
18 & Ex. E.

19 On June 29, Dr. Martinelli performed the colonoscopy at
20 Sutter Coast Hospital. He took three separate biopsies and
21 diagnosed Plaintiff's condition as: "Rectal proctitis, most likely
22 due to ulcerative colitis, isolated at this time." Martinelli
23 Decl. ¶ 8 & Ex. B. He recommended that Plaintiff receive
24 Azulfadine 500 mg tablets twice a day for ninety days in addition
25 to hydrocortisone enemas for two weeks,⁵ that he follow up with

26 ⁵ Azulfadine is a drug used to treat bowel inflammation,
27 stool frequency, rectal bleeding, and abdominal pain in patients
28 with ulcerative colitis.

1 his PCP as usually scheduled, and that he be seen again by Dr.
2 Martinelli at the next colonoscopy clinic. Id.

3 On July 13, Plaintiff submitted an administrative appeal
4 complaining that the treatment he was receiving was not working
5 and that his symptoms were getting worse. He asked to be seen by
6 the doctor for additional treatment, and to be put on a chronic
7 care schedule to be seen every thirty days until his symptoms
8 subside or go into remission. Sayre Decl. ¶ 13 & Ex. F.

9 On July 31, Plaintiff was examined by Dr. Martinelli at the
10 colonoscopy clinic. He complained of blood and mucus in his
11 stools and abdominal pain. Dr. Martinelli noted that the
12 pathology samples from Plaintiff's biopsies showed rectal colitis
13 consistent with ulcerative colitis. Further, Plaintiff had had
14 two weeks of hydrocortisone enemas and was on Asacol 800 mg, but
15 his symptoms persisted. Dr. Martinelli's plan at that point was
16 to consider the next level of medication, Cyclophosphamide at 50
17 mg for one month, and if that did not succeed to recommend
18 intravenous Remicade.⁶ Martinelli Decl. ¶ 9. Pursuant to prison
19 health system parameters, Dr. Martinelli had authority to
20 recommend drug treatment but did not have the final authority to
21 order it. Decl. Thomas J. Rydz, M.D., Supp. Martinelli Mot. Summ.
22 J. (Rydz Decl.) ¶ 9.

23 On August 5, Plaintiff saw FNP Risenhoover and complained of
24 painful side effects from the Cyclophosphamide and that the

25 ⁶ Cyclophosphamide is a chemotherapy agent that is an
26 immunosuppressant; Remicade is a "top of the line" medicine and a
27 more aggressive chemotherapeutic immunosuppressant agent that is
28 infused intravenously. Decl. Thomas J. Rydz, M.D., Supp.
Martinelli Mot. Summ. J. (Rydz Decl.) ¶ 10.

1 medication was not working. The record shows, however, that it
2 was at this visit that FNP Risenhoover first informed Plaintiff
3 that Dr. Sayre had agreed to order the Cyclophosphamide and that
4 his treatment would start after his upcoming dental checkup.
5 Sayre Decl. ¶ 15 & Ex. J.

6 On August 17, Plaintiff started treatment with
7 Cyclophosphamide. Sayre Decl. ¶ 17 & Ex. K. On August 24, he
8 submitted a medical request complaining that the drug wasn't
9 working. Compl. ¶ 23. On August 26, he was seen by FNP
10 Risenhoover, who renewed his prescription for Asacol. Sayre Decl.
11 Ex. K.

12 On August 31, Plaintiff was seen by Dr. Martinelli. After
13 examining Plaintiff, Dr. Martinelli discussed his care with FNP
14 Risenhoover, and recommended to her that his Cyclophosphamide
15 dosage be increased from 50 to 100 mg a day and that a request be
16 placed with the Utilization Review Committee to allow him to
17 receive Remicade treatments. Martinelli Decl. ¶ 10; Sayre Decl.
18 ¶ 17 & Ex. K.

19 On September 4 and 10, Plaintiff sent letters to Dr. Sayre
20 complaining of the lack of effective treatment and pain
21 medication. On September 10 and 18, he submitted medical requests
22 complaining that the Cyclophosphamide wasn't working and that he
23 was suffering side effects. On September 21, he submitted a
24 medical request complaining that the pain was becoming so bad that
25 he couldn't sleep and was becoming depressed. Compl. ¶¶ 25-28.

26 On September 21, Plaintiff was seen by FNP Risenhoover, to
27 whom he complained of cramping, bloody stools and diarrhea.
28 Risenhoover prescribed Tylenol as needed for pain for thirty days,

1 Simethicone three times a day for fourteen days for symptoms of
2 gas such as uncomfortable or painful pressure, fullness, and
3 bloating, and increased Plaintiff's Cyclophosphamide dosage
4 another 50 mg, to 150 mg per day for two weeks. Sayre Decl. ¶ 18
5 & Ex. L.

6 On September 24, Plaintiff submitted another medical request
7 complaining of pain and side effects from the Cyclophosphamide.
8 Compl. ¶ 30.

9 On October 6, Plaintiff was seen by Dr. Martinelli who, after
10 hearing of Plaintiff's continued complaints, suggested that he
11 receive treatment with Remicade and signed a recommendation
12 providing for such treatments at Sutter Coast Hospital.
13 Martinelli Decl. ¶¶ 12-13. On October 14, FNP Risenhoover
14 reviewed the chart and Dr. Martinelli's recommendations; she
15 informed Plaintiff that he had been approved for Remicade
16 treatments and scheduled a follow-up appointment with him in
17 thirty days. Sayre Decl. ¶ 19 & Ex. M.

18 On October 26, Plaintiff received his first Remicade infusion
19 at Sutter Coast Hospital. Sayre Decl. ¶ 20 & Ex. N.

20 On November 6, Plaintiff received his second Remicade
21 infusion. That same date, he submitted a medical request
22 complaining of a burning sensation when urinating. Dr. Adam
23 ordered a urine sample that was sent to the lab the same day, and
24 instructed Plaintiff to notify a nurse if there were any changes
25 in his condition. Sayre Decl. ¶ 20 & Ex. N; Compl. ¶ 32.

26 On November 8 and 11, Plaintiff submitted additional medical
27 requests complaining of continued burning sensation and distress.
28 On November 11, he was told that antibiotics had been ordered to

1 treat what had been diagnosed as a urinary tract infection; he
2 started taking the antibiotics on November 12. On November 25, he
3 was seen for a follow-up medical appointment, at which time it was
4 noted that the infection had resolved. Sayre Decl. ¶ 20 & Ex. N;
5 Compl. ¶¶ 35-38.

6 On December 7, Plaintiff received his third Remicade
7 infusion. He was examined that same day by Dr. Martinelli, who
8 but still had some blood and mucus, as Plaintiff continued to
9 experience moderate gas and cramping. Dr. Martinelli recommended
10 that Plaintiff continue treatment with Asacol and Remicade, and
11 return in two months for a follow-up examination. Martinelli
12 Decl. ¶ 13; Sayre Decl. ¶ 21 & Ex. O.

13 FNP Risenhoover examined Plaintiff on December 30. Plaintiff
14 reported thirty percent improvement in his symptoms after his last
15 Remicade treatment. Risenhoover consulted with Dr. Sayre, and
16 they agreed to continue Plaintiff's treatment with
17 Cyclophosphamide at 50 mg per day. Plaintiff's prescription for
18 Asacol also was renewed. Sayre Decl. ¶ 22 & Ex. P.

19 Dr. Martinelli saw Plaintiff on January 8, 2010.⁷ Plaintiff
20 reported that he had less blood and mucus in his bowel movements,
21 but he still was having many per day with some cramping. Dr.
22 Martinelli recommended continued Remicade treatments, noting the
23 possibility of increasing the dose if the symptoms continued, and
24 scheduled Plaintiff to return in three months. Additionally,
25 after learning that Plaintiff was being considered for transfer to
26

27 ⁷ All events described hereinafter occurred in 2010, unless
28 otherwise noted.

1 another facility and feeling that his treatment for ulcerative
2 colitis would be served best if he were to remain at PBSP, Dr.
3 Martinelli noted in Plaintiff's chart that he "would not recommend
4 transfer for further treatment." Martinelli Decl. ¶ 14; Sayre
5 Decl. ¶ 23 & Ex. Q.

6 Plaintiff received his fourth Remicade infusion on February
7 1. Sayre Decl. ¶ 24 & Ex. R. He was seen on February 9 by Dr.
8 Martinelli, who noted significant improvement in his symptoms and
9 requested that the Remicade infusions continue for a total of
10 eight weeks. Dr. Martinelli felt that Plaintiff's condition was
11 such that he did not need a follow-up appointment at the colon
12 clinic unless requested by his PCP. Additionally, because the
13 matter of his transfer had not yet been resolved, Dr. Martinelli
14 noted in Plaintiff's chart: "It is imperative that Mr. Beattie not
15 miss his treatments, even upon transfer to another facility."
16 Martinelli Decl. ¶ 15; Sayre Decl. ¶ 24 & Ex. R.

17 On March 12, Plaintiff reported at a chronic care appointment
18 that his condition had improved by approximately seventy-five
19 percent and the "violent pain is gone." Sayre Decl. ¶ 25 & Ex. S.

20 On March 29, Plaintiff received his fifth Remicade infusion.
21 Sayre Decl. ¶ 25 & Ex. S. On April 12, he was seen for a
22 follow-up appointment; he reported that he was feeling "[d]ecent"
23 since the last Remicade treatment. Sayre Decl. Ex. S.

24 As a result of the Remicade treatments, Plaintiff's symptoms
25 improved from December 2009 through April 2010. In May 2010,
26 however, they returned. On May 9, Plaintiff submitted a medical
27 request. Compl. ¶¶ 39-41. On May 11, he was seen by a nurse who
28 advised him to continue taking his medications, and reminded him

1 of his upcoming Remicade treatment in the last week of May. He
2 submitted another medical request on May 16; on May 18, he was
3 seen by another nurse, who examined him, advised him to continue
4 taking his medications, reminded him of his upcoming Remicade
5 treatment, and told him to advise medical staff if his symptoms
6 persisted or worsened. Sayre Decl. ¶ 26 & Ex. T.

7 In mid- to late May, Plaintiff wrote a letter to Dr. Sayre,
8 describing his medical condition and expressing concern that he
9 was not getting a response from medical staff. He also submitted
10 another medical request, asking to see the doctor. Compl. ¶¶ 43-
11 44. Dr. Sayre responded to Plaintiff's letter, acknowledging the
12 seriousness of his disease and symptoms and explaining the
13 progress of his treatment. Pl.'s Opp'n Ex. N-3.

14 Also around that time, Plaintiff sent a letter to Dr.
15 Martinelli's home address, describing his medical condition and
16 asking Dr. Martinelli to intervene in his care. Because
17 Plaintiff's action was a violation of prison regulations, Dr.
18 Martinelli was required to notify prison officials. Nevertheless,
19 Dr. Martinelli also contacted Plaintiff's PCP, FNP Risenhoover,
20 informed her of the letter, and advised her that if Plaintiff was
21 failing on his current treatment, he should be referred to a
22 gastroenterologist. Martinelli Decl. ¶ 16 & Ex. "Physician's
23 Progress Notes" dated June 4, 2010.

24 On June 16, Dr. Sayre, after seeing Plaintiff for a chronic
25 care appointment, wrote in his notes that Plaintiff was failing
26 medical treatment for his ulcerative colitis and likely would need
27 surgery. Dr. Sayre noted that, even though Plaintiff had a
28 pending transfer, he would schedule a local consultation for him

1 because, "We should not wait and do nothing for a year with this
2 level of symptoms and disease progression." Dr. Sayre Decl. ¶ 27
3 & Ex. U.

4 On July 1, Dr. Martinelli was asked to provide voice orders
5 for a colonoscopy pre-procedure preparation for Plaintiff; he also
6 recommended that the Prednisone Plaintiff was receiving be
7 continued until he was seen by his PCP. Martinelli Decl. ¶¶ 16-
8 17.

9 Plaintiff received his eighth Remicade infusion on September
10 13. Sayre Decl. ¶ 28 & Ex. V.

11 Dr. Martinelli saw Plaintiff a final time on September 17,
12 and scheduled him for a colonoscopy. On September 20, Dr.
13 Martinelli gave the pre-operative orders for the procedure; on
14 September 23, Plaintiff refused to undergo the pre-operative
15 preparations. Martinelli Decl. ¶ 18.

16 In November 2010, Plaintiff was transferred to RJ Donovan
17 Correctional Facility in San Diego County, where he currently is
18 incarcerated.

19 A colonoscopy was performed on February 25, 2011, at "The
20 Center for Endoscopy" in Oceanside, California. The report of
21 that procedure concluded that Plaintiff "appears to be in
22 endoscopic remission." Sayre Decl. ¶ 29 & Ex. W.

23 DISCUSSION

24 I. Legal Standard

25 Summary judgment is only proper where the pleadings,
26 discovery and affidavits show there is "no genuine issue as to any
27 material fact and that the moving party is entitled to judgment as
28 a matter of law." Fed. R. Civ. P. 56(c). Material facts are

1 those that may affect the outcome of the case. Anderson v.
2 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a
3 material fact is genuine if the evidence is such that a reasonable
4 jury could return a verdict for the nonmoving party. Id.

5 The court will grant summary judgment "against a party who
6 fails to make a showing sufficient to establish the existence of
7 an element essential to that party's case, and on which that party
8 will bear the burden of proof at trial." Celotex Corp. v.
9 Catrett, 477 U.S. 317, 322-23 (1986); see also Anderson, 477 U.S.
10 at 248 (holding fact to be material if it might affect outcome of
11 suit under governing law). The moving party bears the initial
12 burden of identifying those portions of the record that
13 demonstrate the absence of a genuine issue of material fact. The
14 burden then shifts to the nonmoving party to "go beyond the
15 pleadings, and by his own affidavits, or by the 'depositions,
16 answers to interrogatories, or admissions on file,' designate
17 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (citing Fed. R. Civ. P. 56(e)).

18 In considering a motion for summary judgment, the court must
19 view the evidence in the light most favorable to the nonmoving
20 party; if, as to any given fact, evidence produced by the moving
21 party conflicts with evidence produced by the nonmoving party, the
22 court must assume the truth of the evidence set forth by the
23 nonmoving party with respect to that fact. See Leslie v. Grupo
24 ICA, 198 F.3d 1152, 1158 (9th Cir. 1999). The court's function on
25 a summary judgment motion is not to make credibility
26 determinations or weigh conflicting evidence with respect to a
27
28

1 disputed material fact. See T.W. Elec. Serv. v. Pacific Elec.
2 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

3 A district court may consider only admissible evidence in
4 ruling on a motion for summary judgment. See Fed. R. Civ. P.
5 56(e); Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).

6 A verified complaint may be used as an opposing affidavit under
7 Rule 56, as long as it is based on personal knowledge and sets
8 forth specific facts admissible in evidence. See Schroeder v.
9 McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995); see also
10 Keenan v. Hall, 83 F.3d 1083, 1090 n.1 (9th Cir. 1996), amended,
11 135 F.3d 1318 (9th Cir. 1998) (treating allegations in prisoner's
12 verified amended complaint as opposing affidavit); Johnson v.
13 Meltzer, 134 F.3d 1393, 1400 (9th Cir. 1998) (treating allegations
14 in verified motion as opposing affidavit).

15 II. Analysis

16 Plaintiff claims Defendants acted with deliberate
17 indifference to his serious medical needs by failing to provide
18 him with timely and adequate treatment for his ulcerative colitis
19 and the pain resulting therefrom, and for side effects from the
20 medications he was prescribed to treat his condition, including a
21 urinary tract infection.

22 Deliberate indifference to serious medical needs violates the
23 Eighth Amendment's proscription against cruel and unusual
24 punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
25 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled
26 on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133,
27 1136 (9th Cir. 1997) (en banc). A determination of "deliberate
28 indifference" involves an examination of two elements: the

1 seriousness of the prisoner's medical need, and the nature of the
2 defendant's response to that need. See id., 974 F.2d at 1059.

3 A. Serious Medical Need

4 A serious medical need exists if the failure to treat a
5 prisoner's condition could result in further significant injury or
6 the unnecessary and wanton infliction of pain. Id. The existence
7 of an injury that a reasonable doctor or patient would find
8 important and worthy of comment or treatment, the presence of a
9 medical condition that significantly affects an individual's daily
10 activities, or the existence of chronic and substantial pain are
11 examples of indications that a prisoner has a serious need for
12 medical treatment. Id. at 1059-60.

13 Defendants do not dispute that Plaintiff suffers from a
14 serious medical need. Based on the evidence detailed above, the
15 Court finds Plaintiff has shown that he has a serious medical
16 need.

17 B. Deliberate Indifference

18 A prison official is deliberately indifferent if he knows
19 that a prisoner faces a substantial risk of serious harm and
20 disregards that risk by failing to take reasonable steps to abate
21 it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison
22 official must not only "be aware of facts from which the inference
23 could be drawn that a substantial risk of serious harm exists,"
24 but he "must also draw the inference." Id.

25 Deliberate indifference may be shown when prison officials
26 deny, delay or intentionally interfere with medical treatment, or
27 it may be shown in the way in which they provide medical care.
28 See McGuckin, 974 F.2d at 1062. But neither a difference of

1 opinion between a prisoner-patient and prison medical authorities
2 regarding treatment nor a showing of nothing more than a
3 difference of medical opinion as to the need to pursue one course
4 of treatment over another is sufficient to establish deliberate
5 indifference. See Toguchi v. Chung, 391 F.3d 1051, 1059-60 (9th
6 Cir. 2004); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.
7 1981). The reliance by prison officials upon a second medical
8 opinion which a reasonable person would likely determine to be
9 inferior to one from a more qualified medical authority, however,
10 may amount to an Eighth Amendment violation. See Hamilton v.
11 Endell, 981 F.2d 1062, 1066-67 (9th Cir. 1992). In order to
12 prevail on a claim involving choices between alternative courses
13 of treatment, a plaintiff must show that the course of treatment
14 the doctors chose was medically unacceptable under the
15 circumstances, and that they chose this course in conscious
16 disregard of an excessive risk to the plaintiff's health.
17 Toguchi, 391 F.3d at 1058.

18 1. Dr. Adam, FNP Risenhoover and Dr. Sayre

19 Defendants Dr. Adam, FNP Risenhoover and Dr. Sayre argue that
20 Plaintiff's evidence does not raise a genuine issue for trial
21 concerning whether they acted with deliberate indifference to his
22 serious medical needs. In support of their motion for summary
23 judgment, Defendants have provided the declaration of Dr. Sayre
24 and supporting documents from Plaintiff's medical records.

25 According to the evidence provided by the parties, the first
26 documentation of Plaintiff's ulcerative colitis after he was
27 incarcerated is from a diagnostic procedure in 1998, and he
28 remained symptom-free until May 2009. Thereafter, he was treated

1 by Defendants for his ulcerative colitis from May 2009 through
2 early July 2010.

3 Although Plaintiff does not dispute that he received some
4 amount of treatment from Defendants, he maintains that they acted
5 with deliberate indifference by failing to halt ineffective
6 medications, try new medications and treat his pain. The Court
7 finds, however, that Plaintiff's evidence does not raise a genuine
8 issue of material fact.

9 As noted, it is undisputed that ulcerative colitis is a
10 serious and painful disease. Moreover, it also is undisputed that
11 there is no one method of treatment for the disease and its
12 painful symptoms. In his declaration, Dr. Sayre states the
13 following regarding the proper treatment for ulcerative colitis:

14 Treatment for ulcerative colitis depends on the
15 seriousness of the disease. Most people are treated
16 with medication. In severe cases, a patient may need
17 surgery to remove the diseased colon. Surgery is the
18 only cure for ulcerative colitis. Each person may
19 experience ulcerative colitis differently, so treatment
20 is adjusted for each individual. Some people have
21 remissions, periods when the symptoms go away, that last
22 for months or even years. However, most patients'
23 symptoms eventually return. This changing pattern of
24 the disease means one cannot always tell when a
25 treatment has helped.

26 Sayre Decl. ¶ 4.

27 Plaintiff has not presented medical evidence that calls into
28 question the reasonableness of Dr. Sayre's medical opinion in this
regard. Further, the evidence shows that the severity of
Plaintiff's disease required Defendants to adjust his treatment
plan continuously. This was explained thoroughly in a letter Dr.
Sayre wrote to Plaintiff on May 18, 2010, in response to a letter

1 from Plaintiff complaining about his ongoing symptoms and pain.
2 Dr. Sayre acknowledged the severity of Plaintiff's disease and
3 symptoms, explained why certain treatment methods had been chosen
4 and why they are not always successful, and described what had
5 been done to help alleviate his pain:

6 I agree that you have the very serious medical
7 condition of Ulcerative Colitis. As in you[r] case, it
8 is typically a progressive disease that eventually
9 involves destruction of the entire colon. At that
10 point, the only option is complete removal of the colon
11 with permanent diversion to a plastic pouch on the
12 abdominal wall. Naturally, delaying this outcome as
13 long as possible is preferred. The medical treatment of
14 this disease typically only delays this outcome. Each
15 successive treatment plan only works for a limited time
16 and then is never effective again. We attempt to use
17 each treatment option as long as there is any benefit.
18 We strive to delay going to each subsequent step as
19 there are finite steps available. While it may appear
20 we have been reluctant and slow to progress to each
21 subsequent step in your treatment, there is little to be
22 gained and a lot to be lost by speeding the process.

23 I am sorry to hear that Remica[de] is failing. That
24 it is failing is not surprising. For those cases that
25 do not stop, all medical treatments eventually fails
26 [sic]. It is a very dangerous drug and can only be
27 given at the prescribed timing and amounts. Obviously,
28 such a dangerous drug is only given at the very end of
the medical treatment of Ulcerative Colitis.

As to the contentions in your letter, let me make
some points. There is no available change in the
Remica[de] dosing. We should use it as long as there is
any benefit. More or different chronic care visits and
consultations will not change the short term effort to
milk the last benefit from the Remica[de]. You are
receiving two other medications to help with comfort and
reductions in symptoms. You are encouraged to submit
sick call slips (7362) for any problems or unexpected
changes in condition. I note that you have not
submitted any 7362's concerning colitis since 12/6/09.
It is unfortunate that you write long letters when a
simple 7362 is much more effective.

Pl.'s Opp'n Ex. N-3.

1 Plaintiff has not presented medical evidence that supports
2 his claim that Defendants mismanaged the treatment for his
3 ulcerative colitis, the pain caused by the disease and the side
4 effects caused by the treatments he received. Rather, the
5 evidence shows that, over a fourteen-month period, Defendants
6 provided him with numerous medications that are used to treat the
7 underlying disease of ulcerative colitis and its painful symptoms
8 (Asacol, Colocort, Prednisone, Cyclophosphamide and Remicade), and
9 with other medications that are not used to treat the disease
10 itself but are designed to decrease the pain caused by symptoms
11 such as gas, cramping, bloating and rectal discomfort (Azulfidine,
12 Simethicone, Tylenol and enemas). Additionally, when Defendants
13 recognized that the Remicade treatments no longer were effective
14 and all other treatments had failed, Plaintiff was prescribed oral
15 morphine for his pain.

16 While it is undisputed that some of the medical treatments
17 Plaintiff received were more successful than others in treating
18 the disease and providing pain relief, the evidence shows that
19 Defendants took reasonable steps to treat him and abate any
20 painful symptoms or treatment side effects by monitoring his
21 medical condition continuously, addressing his complaints in a
22 timely manner, providing him with ongoing treatment that was
23 adjusted as necessary, and following the recommendations of Dr.
24 Martinelli, the specialist to whom Plaintiff had been referred.

25 Based on this record, the Court finds that Plaintiff has not
26 raised a genuine issue for trial with respect to whether
27 Defendants acted with deliberate indifference to his serious
28 medical needs. Accordingly, summary judgment is GRANTED in favor

1 of Defendants Dr. Adam, FNP Risenhoover and Dr. Sayre.

2 2. Dr. Martinelli

3 Plaintiff claims that Dr. Martinelli acted with deliberate
4 indifference to his serious medical needs by 1) continuing and/or
5 increasing the dosage of medications that ultimately proved
6 ineffective in treating his ulcerative colitis; 2) ignoring the
7 pain he was suffering from his ulcerative colitis; and 3) ignoring
8 the painful side effects he was suffering from treatments with
9 chemotherapy drugs.

10 As discussed above, deliberate indifference is not
11 established simply by a difference of opinion between a prisoner-
12 patient and prison medical authorities regarding treatment. See
13 Franklin, 662 F.2d at 1344. In order to prevail on a claim
14 involving choices between alternative courses of treatment, a
15 plaintiff must show that the course of treatment the doctors chose
16 was medically unacceptable under the circumstances, and that they
17 chose this course in conscious disregard of an excessive risk to
18 the plaintiff's health. Toguchi, 391 F.3d at 1058.

19 Having reviewed the parties' evidence, the Court finds that
20 Plaintiff has not created a genuine issue for trial with respect
21 to whether Dr. Martinelli acted with deliberate indifference to
22 his serious medical needs.

23 In support of his motion for summary judgment, Dr. Martinelli
24 has provided his declaration and attached medical records
25 reflecting the care and treatment he provided to Plaintiff during
26 the relevant time period. Additionally, he has provided the
27 declaration of Thomas J. Rydz, M.D., a physician board-certified
28 in general surgery, whose practice includes endoscopic examination

1 and procedures, including colonoscopy. Relying on the medical
2 records provided by Dr. Martinelli, Dr. Rydz opines that the care
3 and treatment Plaintiff received from Dr. Martinelli was within
4 the medical standard of care for any patient receiving treatment
5 for ulcerative colitis, whether incarcerated or not. Rydz Decl.
6 ¶¶ 18-20.

7 Specifically, the evidence shows that Dr. Martinelli took
8 appropriate histories and physicals, prescribed indicated
9 medications, treated Plaintiff in a timely fashion, and attempted
10 to treat the condition in the most reasonably conservative manner,
11 becoming more aggressive as needed. Rydz Decl. ¶¶ 8-10, 15-20.

12 Additionally, the evidence shows that Dr. Martinelli took
13 reasonable steps to alleviate the pain Plaintiff was suffering
14 from his ulcerative colitis and drug treatments. Notably, the
15 evidence is undisputed that Dr. Martinelli did not have the
16 authority to prescribe medication for PBSP inmates; rather, he
17 only could recommend to prison medical personnel that certain
18 medications or treatments be prescribed. The evidence shows that
19 Dr. Martinelli acted within the standard of care by recommending
20 medications to treat the inflammation in Plaintiff's colon and
21 small intestine, which can cause cramping and pain, and that
22 treating Plaintiff with Cyclophosphamide, in the doses and for the
23 reasons prescribed by Dr. Martinelli, is within the standard of
24 care of a physician treating ulcerative colitis. Rydz Decl. ¶¶ 7,
25 9-15, 18.

26 Although Plaintiff complains that Dr. Martinelli's treatment
27 was inadequate, he has not provided medical opinions that call
28 into question or contradict Dr. Martinelli's evidence that his

1 treatment choices were medically acceptable under the
2 circumstances.

3 Accordingly, the Court finds Plaintiff has failed to raise a
4 genuine issue for trial as to whether Dr. Martinelli acted with
5 deliberate indifference to his serious medical needs, and summary
6 judgment is GRANTED in favor of Dr. Martinelli.

7 C. Qualified Immunity

8 All Defendants argue that they are entitled to qualified
9 immunity.

10 The defense of qualified immunity protects "government
11 officials . . . from liability for civil damages insofar as their
12 conduct does not violate clearly established statutory or
13 constitutional rights of which a reasonable person would have
14 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The
15 threshold question in qualified immunity analysis is: "Taken in
16 the light most favorable to the party asserting the injury, do the
17 facts alleged show the officer's conduct violated a constitutional
18 right?" Saucier v. Katz, 533 U.S. 194, 201 (2001). The relevant,
19 dispositive inquiry in determining whether a right is clearly
20 established is whether it would be clear to a reasonable defendant
21 that his conduct was unlawful in the situation he confronted. Id.
22 at 202.

23 On the facts presented herein, viewed in the light most
24 favorable to Plaintiff, Defendants prevail as a matter of law on
25 their qualified immunity defense because the record establishes no
26 constitutional violation. Even if a constitutional violation did
27 occur, however, Defendants reasonably could have believed their
28 conduct was lawful. Specifically, it would not have been clear to

1 Defendants that they failed to take reasonable steps to abate a
2 substantial risk of harm to Plaintiff by providing him with the
3 above-described care and treatment for his ulcerative colitis
4 symptoms and the symptoms he experienced as a side effect of such
5 care and treatment.

6 Accordingly, Defendants are entitled to qualified immunity,
7 and their motions for summary judgment are GRANTED for this reason
8 as well.

9 D. Plaintiff's Cross-Motion for Summary Judgment

10 On the first page of what is captioned as "Plaintiff's Motion
11 in Opposition of Defendants' Motion for Summary Judgment,"
12 Plaintiff states that he "now files his Opposition to
13 [Defendants'] S.J. Motions and files a Cross-Motion for Summary
14 Judgment." Opp'n at 1. The entirety of the document, however, is
15 dedicated to opposing Defendants' summary judgment motions; no
16 separate cross-motion for summary judgment was filed with the
17 Court. In an abundance of caution, the Court will construe
18 Plaintiff's arguments in opposition to Defendants' summary
19 judgment motions also as a cross-motion for summary judgment.

20 When the parties file cross-motions for summary judgment, the
21 district court must consider all of the evidence submitted in
22 support of both motions to evaluate whether a genuine issue of
23 material fact exists precluding summary judgment for either party.
24 The Fair Housing Council of Riverside County, Inc. v. Riverside
25 Two, 249 F.3d 1132, 1135 (9th Cir. 2001).

26 Based on the record in this matter, and for the reasons
27 discussed above, the Court concludes that Plaintiff has not
28 presented evidence, much less established, that Defendants acted

1 with deliberate indifference to his serious medical needs. No
2 undisputed facts exist which entitle Plaintiff to judgment as a
3 matter of law. Accordingly, Plaintiff's motion for summary
4 judgment is DENIED.

5 CONCLUSION

6 For the foregoing reasons, the Court orders as follows:

- 7 1. Summary judgment is GRANTED in favor of all Defendants.
8 Docket nos. 19 & 23.
9 2. Plaintiff's cross-motion for summary judgment is DENIED.
10 3. Plaintiff's request for copies of court documents is
11 DENIED as moot. Docket no. 16.

12 This Order terminates Docket nos. 16, 19 and 23.

13 The Clerk of the Court shall enter judgment in favor of
14 Defendants and close the file. All parties shall bear their own
15 costs.

16 IT IS SO ORDERED.

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18 Dated: 9/27/2012

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CLAUDIA WILKEN
United States District Judge